4-0900-11294-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HEALTH

In the Matter of the Proposed Adoption of Rules Of the Department of Health Governing the Licensure of Alcohol and Drug Counselors.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Bruce H. Johnson at 9:00 a.m. on October 23, 1997, in Room 10, State Office Building, 100 Constitution Avenue, St. Paul, Minnesota. The hearing continued until all interested persons had been heard.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 through 14.20 (1996), to hear public comment and to determine whether the Minnesota Department of Health (the Department) has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, whether the proposed rules are needed and reasonable, and whether or not any modifications to the rules proposed by the Department after initial publication are substantially different.

Patricia Winget, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55155, appeared for and on behalf of the Department. The Department's hearing panel consisted of Jonathan R. Hall, Administrative Rules Writer; Tom Hiendlmayr, Director of the Department's Health Occupations Programs, Dan Cain, Chairman of the Department's Alcohol and Drug Counselor Licensing Advisory Council, and Cecil White Hat, Chairman of the Department's Alcohol and Drug Counselor Licensing Cultural Diversity Committee. Approximately sixty persons attended the hearing, forty-five of whom signed the hearing register. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments for fifteen calendar days following the hearing – that is, until November 7, 1997. Pursuant to Minn. Stat. § 14.15, subd. 1(1996), five working days were allowed for the filing of responsive comments – that is, until November 17, 1997. At the close of business on November 17, 1997, the rulemaking record closed for all purposes. The Administrative Law Judge received five written comments from interested persons during the comment period. During the response period, the Administrative Law Judge received a written

response from the Department, responding to the comments made or submitted by others.

NOTICE

This Report must be available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rule(s). The agency may then adopt a final rule or modify or withdraw its proposed rule. If the Commissioner of the Department of Health (hereinafter "Commissioner") makes changes in the rule other than those recommended in this report, she must submit the rule with the complete hearing record to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the agency must submit it to the Revisor of Statutes for a review of the form of the rule. The agency must also give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.

When the Commissioner files the rules with the Secretary of State, she shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On April 25, 1994, the Department published a Notice of Solicitation of Outside Information or Opinions Regarding Development of Rules Governing Licensure of Chemical Dependency Counselors at 18 *State Register* 2282. (Exhibit 1)

2. On September 25, 1995, the Department published an Amended Notice of Solicitation of Comments Regarding Development of Rules Governing the Licensure of Alcohol and Drug Counselors at 20 *State Register* 728. (Exhibit 2)

3. An Additional Notice Plan setting out the notice to be provided to interested persons by means other than the statutory minimum requirements was approved with additions by Administrative Law Judge Jon L. Lunde on August 25, 1997. (Exhibit 10)

4. On September 3, 1997, the Department mailed the Dual Notice to all persons and associations who had registered their names with the Department for the purpose of receiving such notice and to other interested persons and groups identified in its notice plan, as approved with additions by Administrative Law Judge Lunde. (Exhibits 7 and 11)

5. On September 8, 1997, the Dual Notice and the proposed rules were published at 22 *State Register* 376. (Exhibit 8)

6. More than 25 persons requested a hearing, and on October 14, 1997, the Department Mailed a Notice of Hearing to all persons who requested a hearing. (Exhibit 13)

7. At the hearing, the Department filed the following documents with the Administrative Law Judge as exhibits:

(a) the Notice of Solicitation of Outside Information or Opinions Regarding Development of Rules Governing Licensure of Chemical Dependency Counselors published at 18 *State Register* 2282, on April 25, 1994 (Exhibit 1);

(b) the Amended Notice of Solicitation of Comments Regarding Development of Rules Governing Licensure of Alcohol and Drug Counselors published at 20 *State Register* 728, on September 25, 1995 (Exhibit 2);

(c) a copy of the proposed rules certified by the Revisor of Statutes (Exhibit 3);

(d) the Statement of Need and Reasonableness (hereinafter "SONAR"), with an Addendum dated September 5, 1997 (Exhibit 4);

(e) memorandum from the Department of Finance dated June 18, 1997, approving the proposed licensure fees (Exhibit 5);

(f) the certification of mailing the Statement of Need and Reasonableness to the Legislative Reference Library (Exhibit 6);

(g) the Certification of Mailing the Dual Notice (Exhibit 7);

(h) Dual Notice and Proposed Rules as published at 22 *State Register* 376 (Exhibit 8);

(i) certification of mailing list (Exhibit 9);

(j) Administrative Law Judge Jon L. Lunde's letter of August 25 approving the Additional Notice Plan with additions (Exhibit 10);

(k) certification of giving notice pursuant to the Notice Plan (Exhibit 11);

(l) a copy of the notice provided to those persons who requested a hearing (Exhibit 12) and the certification of mailing that notice (Exhibit 13);

(m) comments received by the Department prior to the hearing concerning the proposed rules (Exhibits 14 through 83 and 86);

(n) Department's proposed modified rule language for Part 4747.1100, Subparts 2 and 3 (Exhibit 84); and

(o) Department's proposed modified rule language for Part 4747.1400, Subpart 9 (Exhibit 85).

8. During the 15-calendar day comment period which followed the hearing, eleven additional comments were received. (Exhibits 87 through 97) A responsive comment from the Department (Exhibit 98) was received during the succeeding five working day response period.

Task Force and Committee on Proposed Rule

9. Minn. Stat. § 148C.02 (1996) requires the Commissioner to have appointed a 13-member Alcohol and Drug Counselors Licensing Advisory Council for the purpose, among other things, of providing advice and recommendations to the Commissioner on the development of the proposed rule. The Commissioner did, in fact, appoint a 13-member Alcohol and Drug Counselors Licensing Advisory Council, and the Council provided advice and recommendations to the Commissioner on the development of the proposed rule.

10. Minn. Stat. § 148C.11, subd. 3 (1996) requires the Commissioner to have established a committee comprised of, but not limited to, "representatives from the council on hearing impaired, the council on affairs of Spanish-speaking people, the council on Asian-Pacific Minnesotans, the council on Black Minnesotans, and the Indian affairs council" to develop special licensing criteria, that may differ from those specified in Minn. Stat. § 148C.04 (1996), for issuance of a license to alcohol and drug counselors who: (1) are members of ethnic minority groups; or (2) are employed by private, nonprofit agencies, including agencies operated by private, nonprofit hospitals, whose primary agency service focus addresses ethnic minority populations. The Commissioner did, in fact, appoint the committee specified by that statute (hereinafter "Diversity Committee"), and it concluded and recommended that the licensing criteria applicable to the classes of licensees specified in Minn. Stat. § 148C.11, subd. 3 (1996) should not differ from those specified for other licensees in Minn. Stat. § 148C.04 (1996). The Committee went on to make recommendations that all practitioners satisfy certain education and continuing education requirements for training on issues relating to certain minority and special population groups as an alternative to establishing special licensing requirements for practitioners seeking to provide treatment services to members of those minority groups. Although the latter subject was beyond the statutory purpose for establishing the Committee, it was within the discretion of the Commissioner to seek advice from that Committee or any other committee on any subject relating to the licensing of alcohol and drug counselors.

Statutory Authority

11. In its SONAR, the Department cites Minn. Stat. §§ 148C.03, subd. 1, and 148C.02, subd. 2 (1996) as its statutory authority to adopt these rules. (SONAR, at 7) The former statute directs the Commissioner to adopt and enforce rules for "licensure of alcohol and drug counselors" and for "regulation of professional conduct." The latter statute requires the Alcohol and Drug Counselors Licensing Advisory Counsel to provide advice and recommendations to the Commissioner on the development of those rules. The Administrative Law Judge therefore concludes that the Department has the statutory authority to adopt the proposed rule.

Cost and Alternative Assessments in SONAR

12. Minn. Stat. § 14.131 provides that state agencies proposing rules must identify classes of persons affected by the rule, including those incurring costs and those reaping benefits; the probable effect upon state agencies and state revenues; whether less costly or less intrusive means exist for achieving the rule's goals; what alternatives were considered and the reasons why any such alternatives were not chosen; the costs that will be incurred complying with the rule; and differences between the proposed rules and existing federal regulations.

13. In its SONAR (pp. 9-12), the Department identified the classes of persons that will primarily be affected by the rules as alcohol and drug counselors and the clients they serve. The former will be impacted by requirements: (a) to meet minimum competency standards; (b) to undergo a criminal background investigation; (c) to pass written and oral examinations; (d) to complete a minimum number of hours of continuing education biennially; and (e) to adhere to specific rules of conduct. There will be costs associated with compliance with some of these requirements, as well as the general requirements for licensure and renewal. The Department believes that alcohol and drug counselors are likely to pass many of these costs on to their clients, although it is also probable that many counselors are already passing some similar costs associated with private certification on to their clients.

14. Because legislation requires the Department to recover the costs of developing and administering the rules through licensing fees and a temporary surcharge, it is unlikely that promulgation and administration of the rules will result in costs to the Department or to any other agency. (Minn. Stat. § 148C.02, subd. 1(j) (1996)) The proposed rules do not conflict with existing federal legislation.

15. Minn. Stat. § 148C.03, subd. 1(c) (1996) requires the Commissioner to design the rules to protect the public. In the course of public comment on the proposed rules, only two major issues emerged with regard to whether there were less costly or intrusive methods for achieving that and the other purposes of the rules. In both cases, the Commissioner seriously considered alternatives that were rejected for legitimate reasons. As indicated in Finding No. 9, above, the Advisory Committee established by the Commissioner pursuant to Minn. Stat. § 148C.11,

subd. 3 (1996) recommended against adoption of special licensing criteria for issuance of a license to alcohol and drug counselors who: (1) are members of ethnic minority groups; or (2) are employed by private, nonprofit agencies, including agencies operated by private, nonprofit hospitals, whose primary agency service focus addresses ethnic minority populations. The Committee concluded that all counselors should meet the same standards and that special licensing criteria were potentially discriminatory, unnecessary and might convey the unwarranted perception that minority counselors were less competent than other counselors. As an alternative method of satisfying the Legislature's goal of ensuring that minority clients would be provided with culturally appropriate counseling services, the Commissioner accepted the Committee's recommendation that all practitioners be required to meet specified education and continuing education requirements in the area of cultural diversity. (SONAR, pp. 52-93) Those education and continuing education requirements are discussed in greater detail in Findings No. 30 through No. 43, below.

16. The other major issue relating to less costly alternatives concerned the written licensure examination and examination provider. The proposed Part 4747.0040, subp. 3A. essentially requires the Department to contract with "an entity approved by the International Certification Reciprocity Consortium/Alcohol and Other Drug Abuse (ICRC/AODA)" for administration of an examination developed and owned by that organization to licensure applicants. In Minnesota, the only such entity is the Institute for Chemical Dependency Professionals of Minnesota (hereinafter "ICDP"). Interested parties criticized this single-source contracting arrangement both in written comments and at the hearing. The Department considered two other options. The first was for the Department to develop its own written examination, an option that would be very costly and tend to drive up licensing fees. The second was to provide for use of the examination developed by the National Association of Alcohol and Drug Abuse Counselors (NAADAC). But the licensure law requires applicants to take both a written and oral examination, and the Department concluded that the provisions made by the NAADAC for an oral examination did not meet the licensing statute's requirements, while the ICRC's written and oral examinations most closely meet statutory requirements. It is necessary for the Department to contract with the ICRC to administer the examinations because of that organization's proprietary interests in the tests. The policy implications of this decision are discussed below in Finding No. 26.

17. The Administrative Law Judge finds that the Department has met all the requirements of Minn. Stat. § 14.131 (1996), including those relating to cost and alternative assessments.

Impact on Farming Operations

18. Minn. Stat. § 14.111 (1996), imposes an additional notice requirement when rules are proposed that affect farming operations. The proposed rules will not affect farming operations and no additional notice is required.

Nature of the Proposed Rule

19. While most states have been regulating the alcohol and drug treatment programs where most alcohol and drug counselors practice, few states have a method of regulating the activities of counselors in non-program settings. In Minnesota practitioners of alcohol and drug abuse counseling have been regulated as unlicensed mental health practitioners by the Department's Office of Mental Health Practice in accordance with the regulatory scheme established by Minn. Stat. ch. 148B (1996) and Minn. R. pt. 9000 (1995). But those statutes and rules have not provided for many of the regulatory features designed to protect the public that are characteristic of professional licensing rules, such as minimum competency standards, examination of proficiency, continuing education requirements, a code of professional conduct, etc. In 1992 the legislature determined that there was a need for the state to regulate individual counselors, as well as programs, and it enacted Minn. Stat. ch. 148C, which directed the Commissioner to develop and adopt professional licensing rules for alcohol and drug counselors.

20. The proposed rule addresses five main subjects. First, it sets forth the qualifications required of persons seeking licensure. Second, it establishes a process for applying for and renewing licenses. Third, the rule establishes continuing education requirements for licensed alcohol and drug counselors and specifies how those requirements may be met. Fourth, it establishes rules of professional conduct for licensed alcohol and drug counselors, the breach of which may result in disciplinary action against a licensee. Finally, the rule establishes a bill of rights for clients receiving alcohol and drug treatment services.

Standards for Analyzing the Proposed Rule

21. Under Minn. Stat. § 14.14, subd. 2, and Minn. Rule 1400.2100, one of the determinations which must be made in a rulemaking proceeding is whether the agency has established the need for and reasonableness of the proposed rule or rule repeal by an affirmative presentation of facts. An agency need not always present adjudicative or trial-type facts in support of a rule. The agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences. Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984); Mammenga v. Department of Human Services, 442 N.W.2d 786 (Minn. 1989). The Department prepared a Statement of Need and Reasonableness ("SONAR") in support of the proposed rules. At the hearing, the Department primarily relied upon the SONAR as its affirmative presentation of need and reasonableness. The SONAR was supplemented by the comments made by the Department at the public hearing and in its written post-hearing comments.

22. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule. In re Hanson, 275 N.W.2d 790 (Minn.

1978); Hurley v. Chaffee, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950). Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case. Greenhill v. Bailey, 519 F.2d 5, 10 (8th Cir. 1975). A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute. Mammenga v. Department of Human Services, 442 N.W.2d 786, 789-90 (Minn. 1989); Broen Memorial Home v. Minnesota Department of Human Services, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985). The Minnesota Supreme Court has further defined the agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken." Manufactured Housing Institute, supra, 347 N.W.2d at 244. An agency is entitled to make choices between possible approaches as long as the choice it makes is rational. Generally, it is not the proper role of the Administrative Law Judge to determine which policy alternative presents the "best" approach since this would invade the policy-making discretion of the agency. The question is rather whether the choice made by the agency is one a rational person could have made. Federal Security Administrator v. Quaker Oats Company, 318 U.S. 2, 233 (1943).

23. In addition to need and reasonableness, the Administrative Law Judge must assess whether the rule adoption procedure was complied with, whether the rule grants undue discretion, whether the agency has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another, or whether the proposed language is not a rule. Minn. Rule 1400.2100. Because much of the proposed rule was unopposed and was adequately supported by the SONAR, a detailed discussion of each subpart of the rule is unnecessary. The Administrative Law Judge specifically finds that the Department has demonstrated the need for and reasonableness of the proposed rule for any provision of the rule not specifically discussed in this Report, that such provision is specifically authorized by statute and there are no other problems that would prevent the adoption of the rule.

Standard for Analyzing Proposed Modifications

24. Where changes are made to the rule after publication in the State Register, the Administrative Law Judge must determine if the new language is substantially different from that which was proposed originally. Minn. Stat. § 14.15, subd. 3 (1996). The standards to determine if the new language is substantially different are found in Minn. Stat. § 14.05, subd. 2 (1996). The Department has proposed three modifications of the language that was published in the State Register, all of which are analyzed and discussed below.

Proposed Rule 4747.0030 - DEFINITIONS

25. A comment on the proposed rules suggested that the Department's definition of "accrediting association" in proposed part 4747.0030, subp. 2, appears to have departed from the statutory criteria for defining accrediting associations

found in Minn. Stat. § 148C.01, subd. 7 (1996) by conferring on the Commissioner the power to determine whether an organization holding itself out as an accrediting association may be recognized as such. The Department, however, considered it unnecessary to modify the definition in the rule by removing the phrase "recognized by the commissioner," taking the position that the Commissioner would be constrained by the statutory criteria in Minn. Stat. § 148C.01, subd. 7 (1996) in making such decisions. It appears that in the rule, the Commissioner is merely reserving the power in the first instance to apply the law regarding accrediting associations to the facts pertaining to any particular organization holding itself out as an accrediting association. The Department's reason for including the language in question in the rule is that there may be occasions when it would be inappropriate to accept at face value the representations of an organization holding itself out as an accrediting association. The language of proposed Pt. 4747.0030 subp. 2 is therefore both needed and reasonable.

Proposed Rule 4747.0040, subp. 3 - Examination Administration

26. As noted in Finding No. 16, concerns were expressed that proposed part 4747.0040, subp. 3, establishes the ICDP as the sole provider and administrator of the written and oral examinations required of licensure applicants. The thrust of criticism was that establishing a private "testing monopoly" was contrary to public policy. Alternative recommendations ranged from Department personnel administering the ICDP exams to the Department soliciting examination services from other vendors or even developing its own examinations. First of all, Minn. Stat. § 148C.03, subd. 1(b) (1996) provides that the Commissioner shall "hold or contract for the administration of examinations at least twice a year to assess applicants' knowledge and skills." The legislature, therefore, clearly intended the Commissioner to have the choice whether the Department or an outside vendor would develop or administer the licensing examinations. Next, after a thorough review, the Advisory Council and the Department found that other existing testing instruments did not meet statutory requirements. They also found that the additional costs of the Department developing and administering its own tests would likely run into hundreds of thousands of dollars. Since Minn. Stat. § 148C.03, subd. 1(j) (1996) requires that any such additional costs would have to be recovered through increases in license fees, the decision to rely on the ICDP for development and administration of the licensing examinations was reasonable. Proposed part 4747.0040, subp. 3 is therefore both needed and reasonable.

Proposed Rule 4747.0050 - LICENSE REQUIREMENT

27. Criticism was leveled at proposed part 4747.0050, subp. 1 for allowing governmental and hospital-based employees to be exempt from the licensing requirement. Governmental and hospital-based providers of alcohol and drug treatment services were not simply exempted from licensure by the Commissioner in the proposed rule; they were exempted from licensure by the legislature in Minn. Stat. § 148C.11 (1996). Since the Commissioner lacks authority to require licensure

of persons whom the legislature has exempted, proposed Pt. 4747.0050 is both needed and reasonable.

Proposed Rule 4747.0300 - LICENSURE BEGINNING FIVE YEARS AFTER EFFECTIVE DATE OF THIS CHAPTER

28. Proposed part 4747.0300, subp. 1, provides that beginning five years after the effective date of the rule, applicants for licensure must have received a bachelor's degree in a course of study that includes 45 clock hours of classroom education in studies related to Native American issues. Inclusion of this provision has raised several concerns. Some have characterized it as discriminatory because there is no similar requirement for education on issues relating to other minority groups. Others characterize such a requirement as unnecessary, believing that the diverse course distribution requirements of a bachelor's degree are sufficient assurance of an applicant's exposure to diversity issues. Still others appear to view this provision as an unwarranted intrusion by the state into the establishment of curriculum by colleges and universities.

29. Inclusion of this requirement in the rules represents, in effect, a policy decision by the Department to place special emphasis on education on Native American issues in the future undergraduate training of alcohol and drug counselors. As previously noted, an agency is entitled to make policy choices, as long as those choices have a rational basis in fact and there is a rational connection between the choices that have been made and the evidence supporting them. Here, the record contains considerable factual data indicating that substance abuse, particularly alcohol abuse, is a much greater problem for Native Americans than for the white majority or for members of other minority groups. For example, the record indicates that although Native Americans comprise less than 1% of Minnesota's population, they comprise approximately 8.5% of the Minnesotans receiving chemical dependency treatment. (SONAR, p. 59) Cases of liver disease due to alcohol are 14 times greater in American Indians than in non-Indians, ages 25 to 34. (Id.) Death from heavy drinking occurs in Indians 6.5 times more often than in non-Indians. (Id.) The record also indicates that traditional treatment models have only limited success for Native Americans, and there is a need for practitioners to use newer treatment models that relate more specifically to Indian clients. In short, the record establishes a rational basis in fact for this provision of the rule, and proposed pt. 4747.0300, subp. 1 is therefore both needed and reasonable.

Proposed Rule 4747.1100 - CONTINUING EDUCATION REQUIREMENTS

30. By far, the provisions in the proposed rule that evoked the greatest amount of comment and criticism were the continuing education requirements found in proposed part 4747.1100, particularly some very specific requirements for training in issues relating to six minority and other special population groups. Minn. Stat. § 148C.11, subd. 3 (1996) required the Commissioner to appoint a committee to assist in the development of special licensing criteria for counselors who are either members of ethnic minority groups or who are employed by private non-profit

agencies whose primary focus is to serve ethnic minority groups. The Commissioner appointed that Diversity Committee, but after due consideration, the Committee concluded that developing special licensing criteria could lead to less stringent standards for counselors who primarily treated minority clients – a result which the Committee considered to be poor public policy. Rather, the Diversity Committee advised the Commissioner that the purposes underlying Minn. Stat. § 148C.11, subd. 3 (1996) – that is, ensuring that members of ethnic minority and other special population groups received culturally appropriate services – would be much better served by establishing continuing education requirements for specific types of diversity training. In other words, rather than establishing special licensing criteria for some practitioners, the Committee concluded it was better public policy to educate all practitioners to provide culturally appropriate treatment services to members of ethnic minority and other special population groups. The Commissioner accepted and adopted that recommendation and has indicated that she agrees with the underlying rationale.

31. One criticism that has been raised is that it was inappropriate for a committee established to consider special licensing criteria to make recommendations to the Commissioner on the content of continuing education. Although the latter subject falls outside the Diversity Committee's original statutory purpose, a commissioner has discretion to establish advisory committees to provide advice on any aspect of rulemaking, since the decision whether to incorporate such advice and recommendations into a proposed rule is ultimately the commissioner's. In addition to the Commissioner's general authority to conduct studies of health related problems in Minn. Stat. § 144.05, subd. 1(a) (1996), the legislature has not only empowered but encouraged commissioners to establish advisory bodies, such as this committee, in Minn. Stat. § 15.014 (1996). Moreover, in this instance, Minn. Stat. § 148C.11, subd. 3 (1996) evidenced an intent on the part of the legislature that the issue of cultural appropriateness of services be addressed in developing the proposed rules. It was therefore not unreasonable for the Commissioner to provide the Diversity Committee with an additional advisory charge – namely, to make recommendations on ways other than special licensing criteria to ensure that alcohol and drug treatment services would be delivered in a culturally appropriate manner.

32. The Diversity Committee's recommendations, which were incorporated into proposed part 4747.1100, subp. 1 and 2 were essentially as follows: Licensees would be required to obtain forty (40) clock hours of continuing education during a two-year reporting period. During the first two biennial continuing education reporting periods, licensees will be required to obtain a total of sixty-six (66) of their eighty (80) clock hours of required continuing education on issues relating to six different minority and special population groups. The proposed rule also specified the number of hours of training relating to each such group and specified the content of the training with considerable particularity. For all subsequent continuing education reporting periods, three (3) clock hours of training relating to each of the six minority and special population groups would be required, as well as six (6) clock hours of training on the rules of professional conduct. Thus, aside from the special requirements mandated for the first four years, the subject matter for thirty-six (36) of

the forty (40) hours of continuing education required for each biennial reporting period would also be mandated by rule.

33. The comments which followed publication of the Dual Notice criticized the proposed continuing education requirements on a number of different grounds. One claim that went to the underpinnings of the proposed continuing education requirements was that specifying continuing education on issues relating to minority and special population groups is unreasonable because recovery from addiction is not culturally specific – in other words, that cultural issues have no clinical significance in alcohol and drug treatment. This claim was, however, rebutted by a great deal of testimony at the hearing indicating that cultural issues do have clinical significance in treating alcohol and drug treatment clients. Moreover, there is evidence in the record that prior to the enactment of Minnesota Statutes, Chapter 148C, the Chemical Dependency Regulation Coalition conducted hearings and investigations to determine what kinds of harm the public might be suffering because of the lack of a licensing system for alcohol and drug counselors. Much of the harm that was documented during those hearings related to practitioners' lack of awareness of cultural issues. It was therefore reasonable for the Department to conclude not only that cultural issues do have clinical significance but also that their clinical significance is sufficiently important to warrant continuing requirements for practitioners to receive specific training on such issues.

34. Other criticisms of the proposed rule were aimed at the decision to focus continuing education requirements on cultural issues relating to only six particular minority and special population groups, thereby potentially overlooking other diversity issues of importance and failing to account for the needs of other special population groups, such as the elderly, women, gays and lesbians, etc. Suggested alternatives ranged from requiring some training on the needs of other minority and special population groups to abandoning the current format in favor of a smaller amount of more generalized human relations training that would be generically applicable to most minority and special population groups. There is a clear implication in Minn. Stat. § 148C.11, subd. 3 (1996) that the legislature expected the Commissioner to address in some way within the licensing rule cultural issues relating to five specific minority and special population groups – namely, persons with hearing impairments, Native Americans, Black Minnesotans, Spanish-speaking Minnesotans, and Minnesotans of Asian-Pacific descent. Upon advice provided by the Advisory Counsel and the Diversity Committee, the Commissioner concluded for reasons of policy that issues relating to persons with disabilities should also be addressed in the continuing education requirements. There are several ways in which specifying training on issues relating to these six groups will have value in preparing counselors to deal with the cultural needs of other groups and to address other diversity issues of importance. Cultural sensitivity acquired in the course of more specific training will likely be transferable in dealings with other minority and special population groups. Similarly, the specific diversity training can reasonably be expected to help practitioners develop more generalized human relations skills that will be applicable in a variety of other contexts. In short, while there may have been other ways in which skill in dealing with cultural issues could have been infused into

the continuing education requirements, the method selected by the Commissioner was rational and had a reasonable connection with objectives the legislature expected the Department to achieve.

35. Yet another concern was that the proposed continuing education requirement for training on cultural issues, particularly during the first two biennial reporting periods, were too prescriptive as to content. Statements were made that no other licensing rules in health-related fields were as prescriptive about content as this proposed rule is. Minn. Stat. § 148C.09, subd. 1(5) (1996) merely provides that failure "to obtain continuing education credits required by the commissioner" is grounds for suspension, revocation, or restriction of a license. Chapter 148C is otherwise silent on the subject of continuing education and leaves the amount and content of required continuing education to the discretion of the Commissioner. As previously noted, an agency is entitled to make choices between possible approaches as long as the choice made is rational and reasonably related to the end sought to be achieved by the governing statute. Here, the record establishes that one of the ends sought to be achieved by this licensing rule is prevention of harm to the public caused by practitioners' lack of awareness of cultural issues. The Administrative Law Judge finds that the means selected by the Commissioner to accomplish that end is rational and is connected to that end.

36. Other criticisms, however, did raise more fundamental questions about the reasonableness of the proposal. A major concern raised by a number of persons was that the proposed rule establishes a number of clinical competency requirements. Even assuming that cultural issues do have clinical significance in the field, that subject is only one of several areas of clinical practice in which counselors need to be educated. Many believed the mandate that training on cultural issues comprise 66 of 80 required clock hours in the first two biennial reporting periods and 18 of 40 required clock hours thereafter was unreasonably excessive and would not allow many counselors, who could not afford extra continuing education, to spend enough of their continuing education time on other aspects of clinical competency, such as the other core functions identified in Minn. Stat. § 148C.01, subd. 9 (1996). While the Commissioner may have a great deal of latitude in determining, as a matter of policy, which subjects require special emphasis in continuing education, there is a point at which overemphasis of education on cultural issues may create an unreasonable hardship for practitioners who cannot afford to participate in a number continuing education activities that greatly exceeds the minimum and who believe they require continuing education in other aspects of their clinical practice.

37. Another major criticism was that in many parts of the state, counselors indicated that they are rarely, if ever, asked to treat clients from certain of the six identified minority or special population groups. They expressed their opinion that a blanket requirement that all counselors receive continuing education on cultural issues specific to all six groups was unreasonable. For example, one alternative proposal was to require training on cultural issues relating only to members of minority and special population groups whom a counselor actually undertakes to treat – in effect, revisiting the decision not to have special licensing criteria.

38. In response primarily to the latter two criticisms discussed above, the Department proposed two modifications of the continuing education requirements at the hearing. (Exhibit 84) For the first two biennial reporting periods, the proposed modification reduced the number of clock hours from 12 to 6 for five of the six specified issue areas; the requirement for the remaining issue area was left at 6 clock hours. The total number of hours of required cultural diversity training for the first two reporting periods was therefore reduced from 66 to 36 clock hours, leaving an additional 30 clock hours available for other kinds of clinical training. The Administrative Law Judge finds that this portion of the proposed rule, as modified, has been shown to be reasonable and establishes a reasonable balance between the need, for reasons of policy, to place special emphasis on cultural issues in continuing education and the need to provide practitioners for whom additional, optional continuing education might be an unreasonable financial burden with a balanced opportunity for training in other aspects of clinical practice.

39. For succeeding biennial reporting periods, the requirement of three clock hours of instruction in issues relating to each of six minority or special population groups, for a total of 18 clock hours, was eliminated and replaced by a requirement that counselors obtain no less than six clock hours of instruction in the aggregate on issues relating to one or more of the six groups. Again, the proposed modification appears to establish a reasonable balance between training on cultural issues that are clinically significant and training on other aspects of clinical practice. It also addresses, to some extent, the contention that counselors should only be required to receive training on cultural issues relating to members of minority and special population groups whom they actually undertake to treat. There was testimony at the hearing regarding the increasing diversification of Minnesota's population, even in rural areas of the state, and instances of hearing impairment and other disabilities know no geographical or cultural boundaries. The information set forth in the SONAR and the testimony at the hearing both establish a factual basis for required continuing cultural diversity training. The modification, which not only reduces the number of clock hours of training on cultural issues for later reporting periods but also allows counselors a measure of choice as to which cultural issues may be most germane to their practices, was both reasonable and responsive to legitimate concerns raised by practitioners.

40. The proposed modifications to proposed part 4747.1100, subp. 2 and 3, do not make the proposed rule "substantially different," within the meaning of Minn. Stat. §14.05, subd. 2 (1996), from what was originally proposed. The number of clock hours required for continuing education on cultural diversity issues is within the scope of the matter announced in the Dual Notice (Exhibit 8), which made specific reference to those requirements. That the differences appearing in the proposed modifications were a logical outgrowth of the contents of the Dual Notice is readily apparent from the fact that those modifications directly addressed issues raised by comments submitted in response to the Dual Notice. The Dual Notice provided fair warning that the outcome of the rulemaking process could result in modifications, and the Notice expressly identified clock hours of continuing education in cultural diversity topics as a major component of the proposed rule.

41. Another objection to proposed part 4747.1100 is that it is unnecessary, since the objective of delivering culturally appropriate treatment services is adequately accomplished by existing civil rights laws and the rules of professional conduct – that is, proposed part 4747.1400. Specific reference was made to proposed part 4747.1400, subp. 4B, which prohibits counselors from performing services beyond their field of competence. This approach, however, would have the effect of restricting the size of the pool of practitioners from whom members of minority and special population groups could seek treatment. It was rational and within her authority for the Commissioner to reject that approach in favor of an approach that has the effect of increasing the size of the pool of practitioners qualified to provide treatment to members of those groups by requiring all counselors to receive continuing education on cultural issues.

42. Finally, at least two comments dealt with concerns over the provision in proposed part 4747.1100, subp. 2, that only training obtained within three years of the effective date of the rule "must be considered as having met" the diversity training requirements for the first two reporting periods. But the rule does not foreclose the possibility that diversity training obtained earlier than three years prior to adoption of the rule may be considered as having met the requirements. For example, proposed part 4747.1100, subp. 8, empowers the Commissioner to grant waivers with respect to continuing education requirements in cases where the requirements would impose an extreme hardship on the licensee.

43. After considering all of the matters set forth in Findings 30 through 42, above, the Administrative Law Judge finds that proposed part 4747.1100, as modified by Exhibit 84, is needed and reasonable.

Proposed Rule 4747.1400, subp. 5 - Relations to Clients

44. Proposed part 4747.1400, subp. 5G provides that "[a]lcohol and drug counselors must accept no gifts of over $10 in value from a client." Some expressed the concern that the standard of $10 in value was too subject to varying and multiple interpretations to have standing as a legal requirement. They believed that this provision of the rule should either be re-stated or eliminated. A consensus of the Advisory Council believed that there should be a provision in the rules of professional conduct that allowed counselors to accept nominally valuable gifts but that prevented them from taking advantage of clients. There appears to have been no criticism of the spirit of the rule or the need for a rule such as this. The proposed provision actually involves less ambiguity than the provision allowing acceptance of gifts "of nominal value" in the code of ethics for employees in the executive branch of state government (Minn. Stat. § 43A.38, subd. 2(a) (1996)) or the acceptance of gifts of "insignificant monetary value" in the Ethics in Government Act, Minn. Stat. § 10A.071, subd. 3(3) (1996). Proposed pt. 4747.1400, subp. 5G is therefore both needed and reasonable.

Proposed Rule 4747.1400, subp. 9 - Competency in practice with ethnic minority, disabled, and identified population group clients.

45. At the hearing, the Department proposed to modify proposed part 4747.1400, subp. 9 to add the phrase to subparagraph A. that is placed in emphasis below:

> A. A licensee meets the standards in part 4747.1100, subpart 2, when practicing alcohol and drug counseling with a client who is a member of an ethnic minority group, a member of an identified population group, or a client with a disability by acting according to this subpart.

The proposed modification is merely a technical change that brings the body of the text of the subpart into conformity with the title and thereby prevents confusion.

46. A proposal has also been made to modify proposed part 4747.1400, subp. 9 to add and delete the phrases to subparagraph C (1) and (2). that are struck through or placed in emphasis below:

> C.(1) are proficient in American Sign Language at the advanced-plus level or higher of the Sign Communication Proficiency Interview (SCPI) ratings, if the client's primary or preferred language is American Sign Language; or
>
> (2) are trained in working with and work with an American Sign Language interpreter who qualifies as both a certified interpreter and a certified transliterator by the Registry of Interpreters for the Deaf or certified at level ~~three~~ four (4) or higher by the National Association for the Deaf; or

Again, the proposed modifications are essential technical changes which are supported by the deaf community, with which the Department agrees, and to which no objections have been raised.

47. The proposed modifications to proposed part 4747.1400, subp. 9, do not make the proposed rule "substantially different," within the meaning of Minn. Stat. §14.05, subd. 2 (1996), from what was originally proposed. The matters addressed are within the scope of the matter announced in the Dual Notice. (Exhibit 8) The differences appearing in the proposed modifications were a logical outgrowth of the contents of the Dual Notice, and the Dual Notice provided fair warning that the outcome of the rulemaking process could result in the proposed modifications. Moreover, the proposed part 4747.1400, subp. 9, with the modifications indicated above, is needed and reasonable.

Proposed Rule 4747.1600 - FEES

48. A number of individuals expressed their concern that the licensure fees established in proposed part 4747.1600 were excessive, particularly in comparison with the licensure fees for some other health related occupations. Minn. Stat.

§ 148C.03, subd. 1(j) (1996) required the Commissioner to set license fees "so that the total collected will as closely as possible equal anticipated expenditures during the biennium." The same statute also requires the Commissioner to establish a licensure fee surcharge that will recover over a five-year period the Commissioner's expenditures for adoption of the rules. Also as required by law, the Minnesota Department of Finance reviewed and approved the cost estimates and revenue projections that formed the basis for the licensure fees and found them to be reasonable and accurate. Testimony at the hearing established that the proposed fees also fall within the range of fees charged by the licensure boards for other mental health occupations. The licensure fees established by the Commissioner in proposed part 4747.1600 meet the statutory requirements, and that provision of the rule is needed and reasonable.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Minnesota Department of Health (the Department) gave proper notice of this rulemaking hearing.

2. The Department has substantially fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule so as to adopt to repeal the proposed rule.

3. The Department has demonstrated its statutory authority to adopt the proposed rule, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, and 14.50 (i) and (ii).

4. The Department has demonstrated the need for and reasonableness of the proposed rule by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii).

5. Although the Department has proposed three modifications of the language of the proposed rules after publication of the proposed rules in the State Register, the rules are not substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3, and Minn. Rule 1400.2100C.

6. Any Findings which might properly be termed Conclusions are hereby adopted as such.

7. A finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the proposed rules based upon an examination of the public comments, provided that the resulting rule is not substantially different from the

proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be adopted.

Dated this _____ day of December, 1997.

BRUCE H. JOHNSON
Administrative Law Judge

Reported: Stenographically Reported; Transcript Prepared